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# A Toothless Tiger: President Uribe's Proposed Amnesty Bill

By SARAH R. SANDFORD-SMITH\*

From July 1996 to June 2003, at least 1,776 persons were victims of torture [in Colombia]. Of them, 242 were tortured and left alive and 1,534 were tortured before they were murdered . . . 63.63% of all the acts of torture committed during the period under study were attributed to State agents: cases of direct perpetration represented 12.04% (214 cases) and cases through omission, tolerance, acquiescence or support to violations committed by paramilitary groups represented 51.57% (916 cases). 5.68% of the cases (101 victims) were attributed to the guerilla groups.<sup>1</sup>

## Overview

On August 21, 2003, Colombian President Alvaro Uribe presented a bill to his Congress that would allow certain paramilitary leaders to avoid prison for human rights violations.<sup>2</sup> After a trial conviction, amnesty would be conditioned upon the payment of a sum of money to certain organizations set up to compensate the victims of these crimes.<sup>3</sup> Other restraints placed upon these paramilitary leaders include remaining in

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1. COMISIÓN COLOMBIANA DE JURISTAS, ALTERNATE TO THE THIRD PERIODIC REPORT SUBMITTED BY THE COLOMBIAN STATE TO THE COMMITTEE AGAINST TORTURE 9 (Oct. 2003) [hereinafter COLOMBIAN COMMISSION REPORT] (explaining that these statistics must be "understood as a minimal recording, not as definitive data for the total number of victims," because these types of violations rarely get reported).

2. HUMAN RIGHTS WATCH, COLOMBIA'S CHECKBOOK IMPUNITY - A BRIEFING PAPER 1 (Sept. 22, 2003)], available at <<http://hrw.org/backgrounders/americas/checkbook-impunity.pdf>> [hereinafter BRIEFING PAPER].

3. Editorial, *Colombia's Peace Bargain*, WASH. POST, Oct. 3, 2003, at A22.

Colombia, and the inability to hold, or run for, a public office.<sup>4</sup>

According to President Uribe, "the plan would deactivate a brutal confederation of regional factions with 13,000 armed fighters, saving lives and giving two leftist guerrilla groups that continue to wage war an incentive to negotiate...."<sup>5</sup> However, it could be urged that President Uribe's bill was influenced by statements made by one of the members of the largest paramilitary groups in Colombia, the United Self-Defense Forces of Colombia (AUC), that there would be no negotiations if jail time was involved.<sup>6</sup> Though applauded by many in the international world as being tough on organized crime, President Uribe's bill demonstrates that his government is heavily influenced by Colombia's paramilitary groups.

For the paramilitary leaders targeted by this bill, the law is nothing more than a toothless tiger. Paramilitary leaders could avoid prison by paying a fee, or by making reparations to the families of the victims.<sup>7</sup> This fee would be nominal in comparison to the vast amounts of money that many of these leaders have amassed through their connections to the drug-trafficking industry.<sup>8</sup> Paramilitary leaders own approximately 40% of the cocaine industry.<sup>9</sup> If this bill is passed, it is likely that the drug industry would be subsidizing the human rights violations committed by paramilitary leaders.

The United States also has a poor record when it comes to ignoring the human rights crisis in Colombia. Although the United States has supported Plan Colombia,<sup>10</sup> the Plan merely aggravates the cycle of human rights violations.<sup>11</sup> Furthermore, the United States government helped draft this

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4. BRIEFING PAPER, *supra* note 2, at 2.

5. Juan Forero, *Colombia Chief Proposes Amnesty for Death Squads*, DESERET MORNING NEWS (Salt Lake City), Sept. 15, 2003, at A06.

6. BRIEFING PAPER, *supra* note 2, at 3.

7. U.S./LABOR EDUCATION IN THE AMERICAS PROJECT, DEVELOPMENTS UNDER PRESIDENT URIBE I (Jan. 2004).

8. See generally Francisco E. Thoumi, *Illegal Drugs in Colombia: From Illegal Economic Boom to Social Crisis*, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 102 (2002).

9. BRIEFING PAPER, *supra* note 2, at 3.

10. See generally DEPARTMENT OF STATE/INTERNATIONAL INFORMATION PROGRAMS – THE U.S. AND COLOMBIA, U.S. SUPPORT FOR PLAN COLOMBIA, available at <<http://usinfo.state.gov/regional/ar/colombia/wwwhpcus.htm>> [hereinafter U.S. SUPPORT FOR PLAN COLOMBIA].

11. The justification for the support of Plan Colombia is the United States' "War on Drugs." However, by providing money to fight the drug industry, the United States is creating a large underground market. Moreover, both paramilitary and guerilla groups are responding to this market by trafficking more cocaine, and in the process, are responsible for ongoing violations of human rights. This concept will be explored further in this note.

impunity bill,<sup>12</sup> even though some of the paramilitary members who this bill addresses have been designated by the United States as terrorists.<sup>13</sup>

This note will offer two alternatives to President Uribe's proposed bill. The first alternative is to have the United Nations step in and establish a truth commission, much like the commission established in El Salvador.<sup>14</sup> The second alternative is for the paramilitary and guerilla members to stand trial before the International Criminal Court (ICC). Finally, this note will argue that a truth commission is the better alternative.

## I. A History of Abuse

Paramilitary members have plagued Colombian citizens for over three decades.<sup>15</sup> The largest of these paramilitary groups is the AUC. The United States has designated the AUC as a terrorist organization because of the human rights violations that the AUC has committed.<sup>16</sup>

Under Carlos Castaño, the leader of the AUC, Colombians who were thought to share a leftist ideology were tortured and slaughtered.<sup>17</sup> Some of these gross violations of human liberties suffered under Castaño include: the assassination of two presidential candidates,<sup>18</sup> a plethora of village massacres,<sup>19</sup> and the murders of guerilla supporters, sympathizers, and their families. Specifically,

[o]n February 18, 2000, some 300 armed men belonging to the ACCU [what is now part of the AUC] set up a kangaroo court in the village of El Salado, Bolivar. For the next two days, they tortured, garroted, stabbed, decapitated, and shot residents. Witnesses told investigators that they tied one six-year-old girl to a pole and suffocated her with a plastic bag.... "To them it was like a big party," a survivor told the New York Times. "They drank and danced and cheered as they butchered us like hogs."<sup>20</sup>

Human rights workers, and workers in the educational field, have also been

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12. Forero, *supra* note 5.

13. U.S. DEPARTMENT OF STATE, FACT SHEET: SECRETARY OF STATE DESIGNATES FOREIGN TERRORIST ORGANIZATION (FTOs), (Oct. 5, 2001) [hereinafter FACT SHEET].

14. DAVID WEISSBRODT, ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 384 n. 3 (3d ed. 2001).

15. BRIEFING PAPER, *supra* note 2, at 4-6.

16. FACT SHEET, *supra* note 13.

17. BRIEFING PAPER, *supra* note 2, at 5.

18. *Id.* at 6-7.

19. *Id.*

20. *Id.* at 9-10.

targeted by Castaño and his other paramilitary allies.<sup>21</sup>

It has been contended that President Uribe, though once touted as being hard on those who commit violations of human rights, has turned his head from the actions of these paramilitary groups.<sup>22</sup> Moreover, members of the Colombian military view the AUC and other paramilitary groups as allies against guerilla forces.<sup>23</sup> As a result, Colombian citizens have become victims to both governmental and non-governmental oppression.

## II. The Nexus Between Human Rights Violations and the Drug Industry

The fee that paramilitary leaders will have to pay as reparations, and to avoid prison, will be nominal considering the money many paramilitary members have amassed through their connections to drug traffickers.<sup>24</sup> Colombia is the largest exporter of cocaine, and it is estimated that paramilitary leaders control close to half of the cocaine exporting business.<sup>25</sup> Where does this money go? Money received from the drug industry goes to supplying the paramilitary leaders with weapons, as payments for loyalties, and for use as bribes or threats.<sup>26</sup>

The link between the cocaine exporting business and paramilitary groups is closely-bound. In areas where coca is grown, paramilitary groups act as mini-governmental regimes, using their police power to govern the production of cocaine, and exacting taxes from the population for the production and exportation of the narcotic.<sup>27</sup> Although the paramilitary leaders rule with an iron hand, they manage to keep the loyalties of the peasants through fear and bribery. The paramilitary groups provide education, food, and hospitals for the peasants working in the area, with the understanding that certain standards are to be followed.<sup>28</sup> The cheap labor of the peasants affords the paramilitary leaders the ability to earn a handsome profit. The money received from this system would be used to pay the proposed fee.

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21. *Id.*

22. *Id.*

23. See generally Andrew Miller, *Point/Counterpoint: U.S. Military Support for Plan Colombia: Adding Fuel to Fire*, 8 HUM. RTS. BR. 8 (2000) (discussing the relationship between high ranking military officials and the paramilitary).

24. Thoumi, *supra* note 8, at 106-07.

25. Scott Wilson, *Cocaine Trade Causes Rifts in Colombian War*, WASH. POST, Sept. 17, 2002, at A22.

26. Thoumi, *supra* note 8, at 111-112.

27. Wilson, *supra* note 25.

28. Thoumi, *supra* note 8, at 111.

The United States Congress has also found that some of these paramilitary members are major traffickers of cocaine to the United States.<sup>29</sup> Congress has asked President Uribe to have two of these leaders extradited.<sup>30</sup> However, President Uribe explained to Congress that he has already extradited other paramilitary members who Congress had requested and was not going to extradite these two particular individuals (Carlos Castaño and Salvatore Mancuso).<sup>31</sup> It is curious why President Uribe would extradite ninety-four other paramilitary members with links to drug trafficking<sup>32</sup> and not these two. It is probable that these leaders have ties with other paramilitary personnel such that President Uribe is afraid to confront them. Both Castaño and Mancuso have been convicted and sentenced to prison but have managed to avoid serving any time.<sup>33</sup>

If certain military members wish to avoid the hassle of a trial under this bill, they could, instead, use the money they would have used for the impunity fee to threaten witnesses. This is not an uncommon practice. Aside from supplying their weapons, paramilitary groups also use the money from the drug industry to avoid prosecution. Thus, "[t]he judiciary is virtually powerless as a result of decades of death threats and payoffs from drug traffickers, and today less than three percent of crimes are successfully prosecuted."<sup>34</sup> With an industry that takes in over two billion dollars a year, it is not difficult to imagine the illegal drug industry funding the avoidance of a trial.<sup>35</sup>

### III. United States Involvement with the Human Rights Violations and Impunity

#### A. How does Plan Colombia Relate to this Bill?

Plan Colombia was developed by Colombia's government to address certain problems in Colombia, such as combating drug trafficking and reviving the Colombian economy and society.<sup>36</sup> On July 13, 2000, after

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29. *All Things Considered, Uribe Defends Colombia's Amnesty Program* (National Public Radio broadcast, Oct. 1, 2003).

30. *Id.*

31. *Id.*

32. *Id.*

33. BRIEFING PAPER, *supra* note 2, at 6-13.

34. Alan Seagrave, *Conflict in Colombia: How can Rebel Forces, Paramilitary Groups, Drug Traffickers, and Government Forces be Held Liable for Human Rights Violations in a Country Where Impunity Reigns Supreme?*, 25 NOVA L. REV. 525, 527 (2001).

35. Thoumi, *supra* note 8, at 109.

36. U.S. SUPPORT FOR PLAN COLOMBIA, *supra* note 10.

approval by the U.S. Congress, President Clinton signed into law an assistance package to support Plan Colombia.<sup>37</sup> The assistant package consisted of \$1.3 billion dollars in aid to Colombia.<sup>38</sup> This support by the United States was designed to help the drug trafficking problem, as well as to protect human rights and to further the peace process in Colombia.<sup>39</sup>

Of the designated aid, "[a]pproximately seventy-five percent of Plan Colombia aid is earmarked to provide weapons and training to Colombian military and police forces in the fight against narcotrafficking."<sup>40</sup> Unfortunately, this money had the effect of creating an underground market for the drug traffickers:

In contrast to U.S. consumers, the U.S. government is directly and consciously implicated in the Colombian human rights crisis by providing training and military hardware for Colombian military forces and, by logical extension, for their paramilitary allies. It is important to mention that the only reason U.S. consumers are involved is because Drug War policies have succeeded in creating a growing and astronomically profitable illegal market that, among other unpleasant things, is fueling Colombia's human rights crisis.<sup>41</sup>

Both the paramilitary and the guerilla forces are deeply involved with the drug trafficking industry, and have been the cause of thousands of extrajudicial killings and massacres.<sup>42</sup> While reducing the supply of crops was one result of Plan Colombia, another result was a growing number of human rights violations. According to the U.S. Department of State's Human Rights Report on Colombia, released in 2001, the human rights record of the Colombian government did not change for the better.<sup>43</sup> High-ranking military officials (whose offices received much of the aid) were still committing human rights violations in collaboration with paramilitary

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37. *Id.*

38. *Id.*

39. *Id.*

40. Winifred Tate, *Repeating Past Mistakes: Aiding Counterinsurgency in Colombia*, 34 NO. 2 NACLA REPORT ON THE AMERICAS 16 (2000).

41. John Barry, *From Drug War to Dirty War: Plan Colombia and the U.S. Role in Human Rights Violations in Colombia*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 161, 177 (Spring 2002).

42. U.S. DEPT. OF STATE, A REPORT TO CONGRESS ON UNITED STATES POLICY TOWARDS COLOMBIA AND OTHER RELATED ISSUES (submitted to the Congress by the Secretary of State, in consultation with the Secretary of Defense, pursuant to House Conference Report 107-593 accompanying HR 4775 enacted as the 2002 Supplemental Appropriations Act P.L. 107-206) (Feb. 3, 2003), available at <<http://www.state.gov/p/wha/rls/rpt/17140.htm>>.

43. See U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, RELEASED BY THE BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR (Mar. 4, 2002), available at <<http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8326pf.htm>>.

groups.<sup>44</sup> In a less-than secret manner, the United States realized that human rights violations were still being committed, but discarded that fact for what it believed was a greater goal. When General Barry McCaffrey was the U.S. Drug Czar, a spokesperson for his office explained that, “[y]ou don’t hold up the major objective of drug supply control to achieve minor human rights.”<sup>45</sup> The blatant disregard of the United States for the welfare of the Colombian people is astounding.

Many of the paramilitary leaders who committed these atrocities are the individuals whom President Uribe’s bill addresses. Not only are these leaders benefited by the financial aid from Plan Colombia, but they are now being offered amnesty for their crimes.

### ***B. United States Looking out for its own Interests***

As previously mentioned, the United States is alleged to have helped President Uribe draft this bill.<sup>46</sup> Why would the United States want to contribute to the amnesty of paramilitary leaders whom it has pegged as terrorists? There are a few possible answers to this. The first has to do with the United States’ fear of ICC jurisdiction. After a discussion with President Bush on October 1, 2003, President Uribe signed a declaration stating that Colombia would protect Americans in Colombia from being subject to the ICC.<sup>47</sup> By signing this, President Uribe is guaranteeing continuing financial aid to the Colombian military, because President Bush had threatened to cut off aid to countries who would not sign bilateral immunity agreements.<sup>48</sup> President Bush offered Colombia both a carrot and a stick; support for the immunity bill and financial assistance if Colombian President Uribe signed the bilateral immunity agreement, and loss of aid if Colombia did not sign. As a result of these manipulative tactics, Americans do not have to worry about ICC jurisdiction for crimes committed in Colombia.

The second answer as to why the United States is helping President Uribe with this bill has to do with the Free Trade Area of the Americas (FTAA). The Bush administration wants to negotiate with Colombia to “open markets to U.S. goods and services.”<sup>49</sup> Promising financial

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44. *Id.*

45. HUMAN RIGHTS WATCH, THE ROLE OF THE INTERNATIONAL COMMUNITY (2001), available at <<http://www.hrw.org/wr2k1/americas/index.html>>.

46. Forero, *supra* note 5.

47. *All Things Considered*, *supra* note 29.

48. *Latin America: Justice or Impunity?* CATH. NEW TIMES, Jan. 5, 2003, at 8.

49. U.S. DEPARTMENT OF STATE, BUSH BUDGET PLAN PROPOSES \$463 MILLION FOR COLOMBIA IN FY 2005, available at <<http://usinfo.state.gov/gi/Archive/2004/Feb/04->



assistance to Colombia is a good way to negotiate with President Uribe. In his budget for 2005, President Bush has Colombia's Government slated to receive \$463 million, and has an additional \$731 million designated to the Andean region for the Andean Counterdrug Initiative.<sup>50</sup> This money almost ensures Colombian compliance with the FTAA.

Unfortunately, the United States is not looking out for the interests of the Colombian citizens. Because much of the money given to the Colombian government is for military purposes, Colombians need to be on their guard. The military and the paramilitary groups are strongly linked, as evidenced by their collusion in fighting counterinsurgent operations, and by the government's acquiescence to the actions of paramilitary groups.<sup>51</sup> According to United Nations High Commissioner for Human Rights in Colombia, "[i]n many of these areas, the paramilitaries have replaced the Government in important aspects of public life, including the use of armed force."<sup>52</sup> As a result, much of the money the United States puts into the Colombian military funds paramilitary activities. Unless the United States changes its policies with regards to Colombia, Colombians must continue to worry for their safety.

#### IV. Problems with the Bill

It could be asserted that the trials required by this bill would be similar to the fact-finding process of a truth commission. Witnesses and victims would testify to the horrors they have seen and/or felt, thereby eliminating the need for an independent truth commission. However, there are problems with assuming the trials will serve as truth-seeking tribunals. First, the Colombian government has already given judicial police powers to the military, and the military justice system asserts jurisdiction over cases where military members (with connections to the paramilitary members) are being tried.<sup>53</sup> Also, paramilitary members threaten the lives of prosecutors, human rights defenders and testifying witnesses,<sup>54</sup> so that the witnesses are either too frightened to actually testify, or are killed. Additionally, previous trials of some of the paramilitary members have proven fruitless in their acquisition of truth, so it is unlikely that the trials

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321472.html>.

50. *Id.*

51. COLOMBIAN COMMISSION REPORT, *supra* note 1, at 56-58.

52. *Id.* at 56.

53. DEVELOPMENTS UNDER PRESIDENT URIBE, *supra* note 7.

54. AMNESTY INTERNATIONAL, COLUMBIA: LATEST VOTE BY CONGRESS IS A LICENSE FOR THE MILITARY TO FLOUT HUMAN RIGHTS (Oct. 8, 2003), available at <<http://web.amnesty.org/library/Index/ENGAMR230672003?open&of+ENG-COL>>.

under this bill would fare any better.

Colombian military officials have the power to hold suspects without judicial review (for a certain number of days), as well as the power to interrogate these suspects.<sup>55</sup> The judicial powers that have been given to the military allow Colombian military officials and their paramilitary conspirators to detain human rights investigators and witnesses in an effort to intimidate them.<sup>56</sup> Also, the collusion between the military and paramilitary forces has created a system whereby those under the jurisdiction of the military justice system can successfully evade conviction, and even be promoted.<sup>57</sup> For example, General Quiñónez was charged with murdering unionists, human rights workers, and other community leaders between 1991 and 1992.<sup>58</sup> Though a civilian judge was sure Quiñónez would be convicted because of the mountain of evidence against him, the military tribunal found insufficient evidence to convict, and then promoted Quiñónez to commander.<sup>59</sup> On July 6, 2001, formal investigations against Quiñónez were commenced to establish whether he had participated, along with paramilitary members, in a massacre in Chengue.<sup>60</sup> Five months later, Quiñónez was promoted again, but this time to a diplomatic post. One year later, Quiñónez received the Order of Boyacá Medal.<sup>61</sup> It could be argued that the promotions of Quiñónez were a way to get him out of Colombia (his diplomatic post was in Israel). However, what is important to note is that the military justice system did not punish him – in the end, he was rewarded with a medal.

The Fiscalía General de la Nación (Fiscalia) is the Colombian entity charged with the duty of looking into and prosecuting all crimes.<sup>62</sup> The Fiscalía is also responsible for investigating human rights violations.<sup>63</sup> However, according to reports received by Amnesty International:

[T]he Fiscalía is apparently seeking to block or hinder investigation into human rights violations in which senior military officers are implicated. Prosecutors working on such cases have frequently been removed from

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55. AMNESTY INTERNATIONAL, SECURITY AT WHAT COST?, at 5 available at <<http://web.amnesty.org/library/print/ENGAMR23132002>> (visited Nov. 17, 2003).

56. AMNESTY INTERNATIONAL, LATEST VOTE BY CONGRESS IS A LICENSE FOR THE MILITARY TO FLOUT HUMAN RIGHTS, *supra* note 54.

57. SECURITY AT WHAT COST?, *supra* note 55, at 5.

58. *Id.* at 13.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 8.

63. *Id.*

cases or unjustifiably dismissed from their posts while also facing death threats. Witnesses and colleagues working on these investigations have also been killed. This raises concerns that the Fiscalía has failed to guarantee the safety of its public prosecutors and witnesses.<sup>64</sup>

Moreover, even if the prosecutors are not being killed, they are being relieved of their duties to investigate the activities of military and paramilitary members.<sup>65</sup> There is no effective system of justice when it comes to prosecuting the military and paramilitary members. In a two-year period, from December 1999 to February 2002, arrest warrants for paramilitary members only increased by 45%, while arrest warrants for guerrilla members increased by 237%.<sup>66</sup>

Prosecutors and witnesses are not the only ones subject to these horrors. Human rights activists are also targets.<sup>67</sup> In Colombia, over fifteen human rights defenders have been murdered since August 2002.<sup>68</sup> It is hard to imagine that victims or witnesses will be ready to testify at the trials of some of these paramilitary members after hearing of the fates of their peers.

The previous trials of paramilitary members have also proven to be lacking in the area of truth-finding, or bringing the paramilitary members to justice. As previously mentioned, witnesses who were going to testify would be killed before they had the chance to take the stand.<sup>69</sup> Additionally, some of the paramilitary members who would be affected by this bill have already been convicted and sentenced to prison.<sup>70</sup> However, they have been able to escape prison by utilizing their network of paramilitary and military allies. Unfortunately for Colombians, the justice system has been unable to deal with the paramilitary groups.

Another problem with this bill stems not from the truth-seeking process (or lack thereof), but from the legality of the amnesty. According to a number of cases decided by the Inter-American Commission and Court of Human rights, there are certain guidelines when it comes to granting amnesty:

(1) To be legally valid at all, amnesties must be adopted by democratic

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64. *Id.*

65. *Id.*

66. *Id.* at 9.

67. AMNESTY INTERNATIONAL, AMERICAS: HUMAN RIGHTS DEFENDERS: PERSECUTION REACHES EMERGENCY PROPORTIONS (Oct. 11, 2003), available at <<http://news.amnesty.org/mavp/news.nsf/VwPrint/E513C9FDAE731E7C80256DDA0035>>.

68. *Id.* at 1.

69. SECURITY AT WHAT COST?, *supra* note 55, at 16.

70. BRIEFING PAPER, *supra* note 2, at 6-13.

bodies, usually the legislature; self-amnesties by lawless regimes are not valid.

(2) Amnesties may not foreclose investigations of violations, sufficient to vindicate both society's right to know the truth and the survivors' right to know what happened to their relatives.

(3) Amnesties must not preclude victims from initiating or participating in judicial criminal investigations, at least in states that have such procedures.

(4) Amnesties may not foreclose or in practical effect substantially limit the right of victims or survivors to obtain adequate compensation for violations.

(5) Amnesties must not apply to crimes against humanity.

(6) Amnesties should not apply to perjury and other obstructions of justice by officers of the court and litigants.

(7) Amnesties should not be given without an acknowledgement by the state of responsibility for past violations.

(8) Investigations must seek to identify those responsible and name names; otherwise they are insufficient.

(9) States must prosecute and punish perpetrators of serious human rights violations; they may not be amnestied.<sup>71</sup>

It is clear from the examples above that many of the paramilitary leaders have committed gross human rights violations, and, according to guidelines (5) and (9) above, should not be granted amnesty. It is also evident that President Uribe's bill does not sufficiently allow victims to come forward with the truth (in violation of guidelines (2) and (8)), because the victims still need to fear for their lives if the paramilitary leaders who committed these violations are granted amnesty. The bill also does not allow for accountability.<sup>72</sup> For all these reasons, a different solution to Colombia's crisis must be adopted.

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71. DAVID WEISSBRODT ET AL., *supra* note 14, at 385 (quoting Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197 (Fall 1996)).

72. Letter from Jim McGovern, U.S. House of Representatives, to Colin Powell, Secretary of State (Jan. 13, 2004).

## V. Two Possible Solutions

### A. A United Nations Truth Commission

A truth commission serves many different functions. First, it gives validation to the victims and their family members. By recognizing the bloodshed, a truth commission could allow Colombia to recognize its past, and allow it to move forward. Furthermore, a truth commission can give international recognition to the crisis that is occurring in Colombia, thereby encouraging international assistance.

By allowing the paramilitary leaders to escape virtually untouched, President Uribe is sending a message to the international world that he does not have the clout to enforce internationally recognized standards of human rights. In order to gain credibility, President Uribe himself could facilitate the organization of a Colombian truth commission to investigate the crimes committed by the military, the paramilitary, and the guerilla forces. Rather than having the United Nations organize a truth commission, if it were established by President Uribe, it would more likely show the international community that Colombia was taking responsibility for violations of human rights. For example, when establishing the South African Truth Commission, President Mandela first appointed the head of the commission and then enabled the citizens of South Africa to vote for the rest of the members.<sup>73</sup> President Uribe could imitate this method, and allow the Colombians to select the members of the commission. Because of the different political factions in Colombia, allowing the citizens to vote for their truth-finders could ensure that the citizens would feel comfortable speaking to the people they elect.

However, there is the possibility that paramilitary members will still be able to intimidate people from coming forward. If citizens are allowed to vote for the people who serve on the commission, it is likely that paramilitary members or their allies will hold positions on the commission. If this occurs, then they would have access to the lists of people coming forward to testify, and could either kill those people or otherwise prevent them from coming forward. Moreover, with the corruption that is currently present in the government,<sup>74</sup> it is likely that the only people who would be allowed to come forward would be members of the guerilla groups to confess or victims of those subjected to the crimes of the guerilla groups.

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73. Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753, 763 (1998).

74. COLOMBIAN COMMISSION REPORT, *supra* note 1, at 56.

President Uribe could also ask the United Nations to step in and create a truth commission in Colombia as it did in El Salvador.<sup>75</sup> Because Colombia has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR),<sup>76</sup> the United Nations has the authority to step in.

The ICESCR and the ICCPR recognize the basic rights of the individual. Among the rights recognized by the ICESCR are the right to self-determination, the right to form and join trade unions, and the right to the highest standard of physical and mental health.<sup>77</sup> The ICCPR recognizes rights such as the right to determine political status, the right to liberty, and most importantly, the right to life – regardless of political views.<sup>78</sup> However, these rights mentioned above are not respected in Colombia.<sup>79</sup> Citizens who attempt to join unions are thought to be aligned with the guerilla forces and are either murdered, intimidated, or otherwise prevented from joining these unions (the perpetrators of this violence are both the military and paramilitary members).<sup>80</sup> Moreover, the military and the paramilitary do not respect the right to life when the views of the citizens are not pro-government or pro-military. Both the ICESCR and the ICCPR prescribe the means to establish committees to investigate State Parties that are reported to be in violation of both covenants.

Article Two of the CAT also speaks to the rights of the individual, but in relation to being free from torture. The Article states: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”<sup>81</sup>

75. The Commission on the Truth for El Salvador was established by the United Nations to investigate the violence, which occurred during an eleven year period. DAVID WEISSBRODT ET AL., *supra* note 14, at 384.

76. OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPLE INTERNATIONAL HUMAN RIGHTS TREATIES (June 9, 2004), available at <<http://www.unhcr.ch/pdf/report.pdf>> [hereinafter STATUS OF RATIFICATIONS].

77. *See generally* OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (Jan. 3 1976), available at <<http://www.ohchr.org/english/law/cescr.htm>>.

78. *See generally* OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Mar. 23, 1976), available at <<http://www.ohchr.org/english/law/ccpr/htm>>.

79. *See generally* COLOMBIAN COMMISSION REPORT, *supra* note 1.

80. DEVELOPMENTS UNDER PRESIDENT URIBE, *supra* note 7, at 2.

81. OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, ART. 2 (June 26, 1987), available at

Unfortunately, Colombia has not sought to prevent the acts of torture by the military and paramilitary forces.<sup>82</sup> As a party to the CAT, Colombia is in violation of this article. Additionally, Article Four of the CAT explains that the State Parties need to ensure that offenses of torture do not go unpunished and that appropriate penalties are doled out.<sup>83</sup> This bill by President Uribe would, in effect, be forgiving perpetrators of torture without any penalty. Though it could be argued that the monetary sum the paramilitary members would have to pay constitutes a penalty, the CAT requires that the penalty is appropriate to the gravity of the harm inflicted by the torture.<sup>84</sup> It is difficult to pass the straight-face test to claim that any monetary sum would be a sufficient penalty for some of the crimes of torture that have been committed (suffocating a small child with a paper bag,<sup>85</sup> hanging up people on meat hooks,<sup>86</sup> etc.). After describing the actions a State Party needs to do to prevent torture, the Convention sets out guidelines for the United Nations Committee against Torture (Committee), as a means of addressing these types of human rights violations. The Committee has the authority to make investigations into a State Party if there are reports of torture or other types of cruel punishment.<sup>87</sup> This, along with the power granted to the United Nations from the ICESCR and the ICCPR, is where the authority for a United Nations truth commission in Colombia derives.

The U.N. committee in Colombia could be composed of members of the United Nations, appointed by the Secretary General. This would eliminate the problem of corruption and intimidation, which could occur with a Colombian-organized commission. Additionally, the United Nations committee could attempt to get the Colombian government, the paramilitary forces, and the guerilla forces to agree to negotiations during this process, as the committee collects information. It is possible that these groups would agree to negotiations because they have already started the process of laying down their weapons.<sup>88</sup>

A United Nations truth commission would also be free from political strife. This is especially important in Colombia, where allegations of bias

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<<http://www.ohchr.org/english/law/cat.htm>> [hereinafter CONVENTION AGAINST TORTURE].

82. COLOMBIAN COMMISSION REPORT, *supra* note 1.

83. See CONVENTION AGAINST TORTURE, *supra* note 81.

84. *Id.*

85. BRIEFING PAPER, *supra* note 2, at 9.

86. *Id.* at 8.

87. CONVENTION AGAINST TORTURE, *supra* note 81, art. 20.

88. Eric Green, *OAS Reports on New Effort to Help Bring Peace to Colombia*, WASH. FILE, Feb. 5, 2004.

(with a Colombian-created truth commission) could be debilitating to the truth commission. If the guerrilla groups decided there was bias, they would just return to fighting.

However, there are also problems inherent with a truth commission. Colombia is currently in a state of unrest. Between the military and paramilitary members, and the guerilla forces, Colombians have to sleep with one eye open. A problem with the truth commission would be determining when to cut off the investigations. Because the conflict is still happening, the truth commission would have virtually no ending point in its search for the truth. Hostilities between the groups in Colombia would need to end – otherwise the job of the truth commission would never be completed.

Additionally, there is currently little incentive for the military and the paramilitary members to stop their violence. Colombia is the third largest recipient of monetary aid from the United States.<sup>89</sup> Much of this money goes into funding the military in its fight against Marxist-guerrillas.<sup>90</sup> Why would the military stop fighting when it is receiving money for its cause? Furthermore, if the military and paramilitary members do not cease their hostilities, the guerrilla groups will not be able to do so either, because it would be suicide. The funding of the Colombian military by the United States thus creates a vicious cycle. As long as the United States keeps shoving money into the Colombian military, the paramilitary groups will be able to maintain their stronghold, and a truth commission would be almost useless.

In order to deal with these possible problems, a United Nations truth commission would need to address the United States' role in the commission of human rights violations. Recognizing the human rights violations that are occurring in Colombia, without identifying the monetary sources and policies that aid in the commission of these violations, will not stop the problems. This is one reason why a United Nations truth commission would be the best solution. Any other truth commission established by the Colombian government might decide not to acknowledge the role the United States has had for fear of having their aid cut off, as opposed to redirected.<sup>91</sup>

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89. BRIEFING PAPER, *supra* note 2, at 1.

90. CENTER FOR INTERNATIONAL POLICY, JUST THE FACTS: A CIVILIAN'S GUIDE TO U.S. DEFENSE AND SECURITY ASSISTANCE TO LATIN AMERICA AND THE CARIBBEAN (Dec. 18, 2003), available at <<http://www.ciponline.org/facts/co.htm>>.

91. For example, for 2004, the United States requested \$552.59 million dollars for military and police aid to Colombia, while it requested only \$135.70 million to be used for social and economic aid. *Id.*



## B. ICC Jurisdiction

Another alternative to President Uribe's proposed bill is to have the ICC act as a tribunal for the crimes committed by the paramilitary and guerilla members. The ICC has jurisdiction over crimes against humanity committed by both state and non-state actors.<sup>92</sup> Moreover, ICC jurisdiction seems to fit the problems that arise from this bill, because the ICC was designed to "provide an alternative to impunity where independent and effective judicial systems are not available."<sup>93</sup> After a referral from the Security Council, State Party, or the prosecutor, the ICC has jurisdiction if the conduct is by someone who resides in the State that has ratified the ICC, or if the conduct occurred on the territory of a State that has ratified the ICC.<sup>94</sup>

On August 5, 2002, Colombia ratified the ICC, so it is subject to its jurisdiction for crimes committed in Colombia or by Colombians.<sup>95</sup> Also, on that same day, Colombia exercised its option under the Rome Statute to opt out of war crimes jurisdiction for seven years.<sup>96</sup> However, this exemption does not apply to the crimes against humanity that have been committed by the paramilitary and guerilla members that President Uribe's bill addresses.

Article 77 of the Rome Statute provides for the penalties that would be applicable to many of the paramilitary and guerilla leaders.<sup>97</sup> These include:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

(2) In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

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92. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9 (1998), art. 7 [hereinafter Rome Statute].

93. DAVID WEISSBRODT ET AL., *supra* note 14, at 419 (quoting Jerry Fowler, *The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations*, 6 HUM. RTS. BRIEF 1 (Fall 1998)).

94. *Id.*

95. STATUS OF RATIFICATIONS, *supra* note 76, at 3.

96. *Latin America: Justice or Impunity?*, *supra* note 48.

97. Rome Statute, *supra* note 92, art. 77.

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.<sup>98</sup>

Moreover, Article 78 states that when sentencing an individual found guilty by the ICC, factors such as the gravity of the crime and whether the individual has served any previous time, will be taken into account.<sup>99</sup> In addition to punishing the perpetrators of serious violations of human rights, the ICC also has the ability to order reparations to the victims.<sup>100</sup>

The ICC seems to provide the safety that Colombian courts cannot provide. An international tribunal, as opposed to a local one, would not carry the risks of violence that are inherent to Colombia.<sup>101</sup> Neither witnesses nor prosecutors would have to fear for their lives. Moreover, the collusion between the government and the paramilitary leaders would be absent in an international tribunal.

The ICC also appears to redress the victims better than a truth commission could.<sup>102</sup> Instead of merely allowing the victims to come forward and tell their stories, the ICC could order jail terms for the perpetrators of some of these atrocities. This aspect of justice is absent with a truth commission. Moreover, if the ICC finds the abusers guilty, the ICC does not grant the amnesty, which seems innate with the truth commission. It is possible that a U.N. truth commission would not meet the guidelines for granting amnesty set forth by the Inter-American Commission and Court of Human Rights.<sup>103</sup> This problem would not exist with the ICC. If found guilty of human rights violations, these paramilitary and guerilla leaders would be sitting in jail.

As promising as it may sound, there are setbacks attached to jurisdiction by the ICC. The first of which is that the tribunal only has jurisdiction over crimes that were committed after the Rome Statute came into effect, on July 1, 2002.<sup>104</sup> Hence, while a truth commission could go

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98. *Id.*

99. *Id.* art. 78.

100. *Id.* art. 75.

101. As previously mentioned, both witnesses and prosecutors in local tribunals are threatened and/or killed.

102. While a truth commission could acknowledge the United States' role in Colombia, its powers are limited. The ICC has the authority to sentence perpetrators, as well as to provide for reparations to the victims and their families.

103. See *infra*, Part V. However, it is unlikely that a U.N. truth commission would be held to the same standards as a locally established commission. A truth commission created by a neutral tribunal would lack the corruption inherent with a local tribunal.

104. Rome Statute, *supra* note 92, arts. 11, 126.

back almost indefinitely, the ICC would be limited to crimes that happened within the past year and a half. This would ignore many of the human rights violations that have been committed by the paramilitary and guerilla members and additionally, ignore many of the victims. Unfortunately, there is no way around this time restriction.

Another problem with the ICC is that it is questionable whether its jurisdiction would reach to explore the aid the United States has given to the Colombian military.<sup>105</sup> The ICC functions as a regular court, and if the United States did not commit the human rights violations itself, it is unlikely that the extent of U.S. involvement would be uncovered. Moreover, the United States has not ratified the ICC, and has also signed a bilateral immunity agreement with Colombia.<sup>106</sup> Therefore, even if the ICC could investigate into Plan Colombia and U.S. assistance, it would not have jurisdiction to suggest a change in any of the U.S. policies.

A further setback with the ICC is that it requires the accused be present at the trial.<sup>107</sup> Many of the paramilitary and guerilla members have thus far been able to avoid showing up for trials and have evaded prison for a number of years.<sup>108</sup> These individuals were convicted in abstensia in Colombia because they refused to show up.<sup>109</sup> If these same individuals refused to participate in the ICC, they would go unpunished. It is for all these reasons that the ICC, although a better alternative than the proposed bill, would not sufficiently address the problems in Colombia.

## Conclusion

A United Nations truth commission is the best alternative to President Uribe's proposed bill. Acknowledging the atrocities suffered by many Colombian citizens would strengthen the democracy, and give President Uribe international credibility. Ignoring the violations and allowing paramilitary leaders to pay a fee to prevent prison is in effect letting the cocaine industry subsidize gross violations of human rights.

It is still possible to be optimistic. After the elections on October 28, 2003, and with the first leftist politicians in office, the chances of creating

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105. The ICC requires the defendant to be present before the tribunal. Rome Statute, *supra* note 92, art. 63(1). Also, President Uribe has signed a bilateral immunity agreement with the United States. *All Things Considered*, *supra* note 29. Therefore, it is unlikely that the ICC would recognize the United States' involvement with Colombia.

106. *Latin America: Justice or Impunity?*, *supra* note 48.

107. Rome Statute, *supra* note 92, art. 63.

108. BRIEFING PAPER, *supra* note 2, at 6-13.

109. *Id.*

something like a truth commission in Colombia seem to be less distant. Moreover, the situation in Colombia is starting to gain an international audience. With enough international criticism, it is possible that the United States would stop funding the Colombian military, or would redirect the bulk of the money into social programs. Either way, an international backlash would signal to the United States that it needs to change its hypocritical stance towards its policies in Colombia. The situation in Colombia does not have to be a vicious cycle of violence. There are members of the U.N. Human Rights Committee with experience organizing truth commissions. Colombia just needs a shove in the right direction, and because of its ratification of the ICESCR, the ICCPR and CAT, the United Nations can do just that.

